

- A** **Tuan Hamzah bin Tuan Mad & Anor v
Azidi bin Che Harun & Ors**
- B** HIGH COURT (KUANTAN) — CIVIL APPEAL NO 12–27 OF 2004
MOHAMED APANDI ALI J
9 JUNE 2008
- C** *Tort — Negligence — Road accident — Collision involving three vehicles —
Liability of — Whether appellants 100% liable — Whether quantum of damages
awarded justified*
- D** There were three suits before the sessions court that arose from the same cause
of action ie an accident which occurred at kmM23.7 Jalan Kuantan-Maran
between three different vehicles; a motorcar, a motorbus and a motor lorry.
E The motorbus collided with the motorcar that came from the opposite
direction on its front causing the motorcar to spin and as the result the
motorcar had a second collision with the motor lorry that was trailing behind
it. The learned sessions court judge made a finding of fact that the liability
for the accident was 100% on the appellants. In the first suit, the court
awarded RM67,000 as general damages and a further sum of RM2,838 as
F special damages. While in the second suit, the court awarded RM46,800 as
lost of support, RM26,040 for lost of EPF contribution and a sum of
RM3,800 as cost of funeral. Meanwhile, in the third suit, a sum of
RM10,000 was awarded as general damages, RM264,000 for lost of support,
RM6,600 for cost of funeral and a sum of RM134 for cost of documents. The
G appellants appealed against the decision on liability and on the quantum of
damages awarded.
- H** **Held**, dismissing the appeal on liability and varying the quantum of damages:
- I** (1) Based on the evidence and looking at the sketch plan and photographs
on damage to the vehicles, the findings of the trial judge with regard to
the liability of the appellants have been rightfully made and as such
there was no reason to alter the findings. Further, when there were
conflicting versions on how the accident occurred, the court shall look
at the silent and incontrovertible evidence (see paras 39 & 42).
- (2) In the first suit, the amount awarded for the loss of hearing was a
reasonable amount. However, with regards to the head injuries suffered
by the respondent, the reasonable sum that should be awarded was

RM35,000 and accordingly, the sum awarded by the trial judge was reduced to the above sum (see paras 45–46).

- (3) In the second suit, the correct calculation for the loss of support should be $RM175 \times 12 \times 12 = RM25,200$ only and not $RM325 \times 12 \times 12 = RM46,800$ as held by the trial judge. However, the sum of RM26,040 awarded as loss of EPF contribution to the respondent by the trial judge is maintained since the appellants have failed to substantiate their submission that the spouse must be a named beneficiary of the said contribution before she could make any claim (see paras 49–50).

- (4) In the third suit, the documentary evidence that could be used in order to estimate yearly reasonable income of the deceased on the average was the JA Form for the year 1993 and 1994. Taking the highest earning which is about RM1,867, the correct calculation for the loss of support should be $RM1,500 \times 66 = RM99,000$. Accordingly, the amount of RM264,000 for loss of support awarded by the trial judge was reduced to RM99,000. As regards to the issue of the cost of funeral raised by the appellant, the respondent had duly testified and had further tendered a receipt as the documentary evidence to prove that the cost of funeral was indeed RM6,600. There was therefore no reason to alter the amount awarded by the trial judge (see paras 53–54).

[Bahasa Malaysia summary]

Terdapat tiga guaman di hadapan mahkamah sesyen yang timbul daripada kausa tindakan yang sama iaitu satu kemalangan yang berlaku di km23.7 Jalan Kuantan-Maran di antara tiga kenderaan yang berlainan; sebuah kereta, bas dan lori. Bas yang telah berlanggar dengan kereta yang datang dari arah yang bertentangan di hadapannya menyebabkan kereta tersebut berpusing dan menyebabkan kereta tersebut terlibat dengan perlanggaran kedua dengan lori yang mengekori dibelakangnya. Hakim mahkamah sesyen telah membuat keputusan bahawa liabiliti kemalangan adalah 100% ke atas perayu. Guaman pertama, mahkamah telah mengawardkan sebanyak RM67,000 sebagai ganti rugi am dan RM2,838 sebagai ganti rugi khas. Sementara di dalam guaman kedua, mahkamah telah mengawardkan sebanyak RM46,800 sebagai kehilangan sara hidup, RM26,040 bagi kehilangan sumbangan KWSP dan sejumlah RM3,800 sebagai kos pengebumian. Sementara di dalam guaman ketiga, sejumlah RM10,000 diawardkan sebagai ganti rugi am, RM264,000 bagi kehilangan sara hidup, RM6,600 untuk kos pengebumian dan sejumlah RM134 untuk kos dokumen-dokumen. Perayu merayu terhadap keputusan atas liabiliti dan juga kuantum ganti rugi yang telah diawardkan.

- A** **Diputuskan**, menolak rayuan atas liabiliti dan mengubah kuantum ganti rugi:
- (1) berdasarkan kepada keterangan dan melihat kepada plan kasar dan gambar-gambar berkenaan dengan kerosakan kenderaan, keputusan hakim bicara berkenaan dengan liabiliti perayu-perayu telah pun dibuat dengan betul dan oleh itu tiada sebab untuk mengubah keputusan tersebut. Selanjutnya, apabila terdapat versi yang bertentangan berkenaan dengan bagaimana kemalangan berlaku, mahkamah seharusnya melihat kepada keterangan senyap dan tidak dipertikaikan (lihat perenggan 39 & 42).
- B**
- C**
- (2) Di dalam guaman pertama, jumlah yang diawardkan bagi kehilangan pendengaran adalah jumlah yang munasabah. Tetapi, berkenaan dengan kecederaan kepala yang dialami oleh responden, jumlah munasabah yang perlu diawardkan adalah RM35,000 dan oleh itu, jumlah yang diawardkan oleh hakim bicara adalah dikurangkan kepada jumlah di atas (lihat perenggan 45–46).
- D**
- (3) Di dalam guaman kedua, pengiraan yang sebenar bagi kehilangan sara hidup seharusnya $RM175 \times 12 \times 12 = RM25,200$ sahaja dan bukannya $RM325 \times 12 \times 12 = RM46,800$ seperti mana yang diputuskan oleh hakim bicara. Tetapi jumlah RM26,040 yang telah diawardkan sebagai kehilangan sumbangan KWSP kepada responden oleh hakim bicara dikekalkan, apabila perayu-perayu telah gagal untuk mengesahkan hujahan mereka bahawa pasangan mesti dinamakan sebagai benifisiari terhadap sumbangan tersebut sebelum beliau boleh membuat apa jua tuntutan (lihat perenggan 49–50).
- E**
- F**
- (4) Di dalam guaman ketiga, keterangan dokumentasi yang boleh digunakan untuk menilai pendapatan tahunan si mati yang munasabah berdasarkan kepada purata adalah Borang JA bagi tahun 1993 dan 1994. Mengambil pendapatan tertinggi iaitu RM1,867, pengiraan yang betul untuk kehilangan sara hidup seharusnya $RM1,500 \times 66 = RM99,000$. Sewajarnya, jumlah RM264,000 bagi kehilangan sara hidup yang telah diawardkan oleh hakim bicara dikurangkan kepada RM99,000. Berkenaan dengan isu kos pengebumian yang telah dibangkitkan oleh perayu, responden telah memberikan keterangan dan telah mengemukakan resit sebagai keterangan dokumentasi untuk membuktikan bahawa kos pengebumian sebenarnya adalah RM6,600. Oleh itu, tiada sebab untuk mengubah jumlah tersebut yang telah diawardkan oleh hakim bicara (lihat perenggan 53–54).]
- G**
- H**
- I**

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1664–1665.

Cases referred to

- Azizi bin Amran v Hizzam bin Che Hassan* [2006] 4 MLJ 555 (refd)
Chew Sheong Yoke v Lawrence Su Chu Seng & Anor [1996] MLJU 40 (refd)
Chong Chee Khong & Anor v Ng Yeow Hin [1997] 5 MLJ 786 (refd)
Henry Trading Co Ltd v Harun [1966] 2 MLJ 281 (refd)
ING Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong [2001] 4 MLJ 461 (refd)
Jong Chuk v Chong Tung Sang & Ors [1998] 7 MLJ 127 (refd)
Ladd v Marshall [1954] 1 WLR 1489 (refd)
Lee Hock Lai v Yeoh Wah Pein [1999] 5 MLJ 172 (refd)
Mohd Zin bin Abdullah v Aznizal bin Rajari @ Mohd Razali [2000] MLJU 699 (refd)
Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285 (refd)
Noor Azahar Habin v Rajaswari Sithampara Pillai & Anor [1991] 3 CLJ 150 (refd)
Soh Hau Huat, Administrator of the Estate of Soh Mee Leong, deceased v Mohd Nor bin Taya & Anor [1992] 4 CLJ 2185 (refd)
Sundram v Arujunan & Anor [1994] 3 MLJ 361 (refd)
Yah bt Aji v Fatimah binti Haji Mohamed Ariffin & Ors [1969] 2 MLJ 186 (refd)
Zainap bt Abd Majid & Ors v Gan Eng Hua & Ors [1995] 1 MLJ 801 (refd)
- (Omar & Joseph Au) for the appellants.
 (Andrew-David Wong & Ong) for the respondent.
 (G Naidu & Partners) for the respondent.
 Mala a/p Doraisamy (Ravi Moorthi, Norizan, Mala & Partners) for the respondent.

Mohamed Apandi Ali J:

[1] This is an appeal and cross-appeal from the sessions court against decisions made in three separate suits that were jointly heard by the learned sessions court judge. The three suits 53-13 of 1997 ('the first suit'), 53-17 of 1999 ('the second suit') and 53-55 of 1999 ('the third suit') arose from the same cause of action ie, an accident that occurred on 19 February 1996 at KM 23.7 Jalan Kuantan-Maran involving three vehicles.

BRIEF FACTS OF CASE

[2] The accident occurred on 19 February 1996 at KM23.7 Jalan Kuantan-Maran at about 12.45am between three different vehicles;

A a motorcar bearing registration No CAA6896, a motorbus bearing registration No DW 7661 and a motor lorry bearing registration No CAJ 4267.

B [3] At the material time of the accident, the motorbus was coming from Maran, heading towards Kuantan, whereas the motorcar and the motor lorry were coming from Kuantan heading towards Maran. The accident occurred when the motorbus collided with the motorcar that came from the opposite direction on its front causing the motorcar to spin and as the result, the motorcar had a second collision with the motor lorry that was trailing behind it.

C [4] The accident had caused several damages to all three vehicles and had also killed both the driver and the passenger of the motorcar. Several passengers of the motorbus also suffered injuries as the result of the accident.

D This resulted in the multiple litigations and litigants.

THE LITIGANTS

E [5] The litigants and their respective claims in all the three suits, are as follows:

Suit No 53–13 of 1997 (first suit)

F [6] The plaintiff, Azidi bin Che Harun was one of the passengers of the motorbus. He was unconscious following the accident and was admitted to the Tengku Ampuan Hafzan Hospital. He had bleeding from the nose and left ear. The Glasgow coma scale was full except for some lapses of memory. He suffered from a right periorbital haematoma which persisted and weakness of the extraocular muscles on the right eye. CT scan also showed a large

G extramural haematoma which causes the lapses of memory and eye muscle weakness.

H [7] He returned to the General Hospital Kuala Lumpur on 14 March 1996 to have the haematoma evaluated. He had left sided headache, defective vision and impairment of hearing on the left side. Examination showed left tympanic membrane injury and ossicular bone disruption with mild conduction deafness. The right eye showed weakness of the Abductor muscle. (Refer p 215 of the appeal record).

I [8] The plaintiff's claim was for both general and special damages together with interest and cost for the injuries, loss and damages suffered by him as the result of the accident against:

- (i) Legal Representative of Chung Mun Kit (deceased), the driver of the motorcar that was killed in the accident;

- (ii) Man Choon Kut, the registered owner of the motorcar; A
- (iii) Tuan Hamzah bin Tuan Mad, the driver of the motorbus; and
- (iv) Yasco Corporation Sdn Bhd, the registered owner of the motorbus.
- Suit No 53–17 of 1999 ('second suit')* B
- [9] The plaintiffs are Chung Mau Leong and Man Choon Kut, the parents of Chung Mun Kit who was killed in the accident. They filed a suit to claim for loss of support and also for special damages, interests and cost against: C
- (i) Yasco Corporation Sdn Bhd, the registered owner of the motorbus;
- (ii) Tuan Hamzah bin Tuan Mad, the driver of the motorbus;
- (iii) Selvaraju a/l Alimalai, the registered owner of the motor lorry; and
- (iv) Marasaid bin Tarasim, the driver of the motor lorry. D
- Suit No 53–55 of 1999 ('third suit')*
- [10] The plaintiff, Soon Yoke Lean was the wife of Pang Yoke Kyee, the passenger of the motorcar that was also killed in the accident. She filed a claim for loss of support for her and their five children and also for special damages, interests and costs against: E
- (i) Yasco Corporation Sdn Bhd, the registered owner of the motorbus;
- (ii) Tuan Hamzah bin Tuan Mad, the driver of the motorbus; F
- (iii) Vallapa Ganabathy Enterprise, the registered owner of the motor lorry; and
- (iv) Marasaid bin Tarasim, the driver of the motor lorry. G
- [11] The learned sessions court judge after considering all evidence made the following decisions.
- The first suit* H
- [12] The court awarded general damages and special damages against the third and fourth defendants in this suit:
- General Damages — RM67,000 with interest at the rate of 8% pa from the date of the service of the summons (6 March 1997) until the date of temporary payment order (29 January 2001) ie, for 1,424 days out of the sum of RM30,000. I

- A** Interest at the rate of 8% pa on the sum of RM67,000 minus the temporary payment in the sum of RM30,000 that has been paid out of the temporary payment order given on 29 January 2001 ie, the sum of RM37,000 from the date of temporary payment (29 January 2001) until the date of judgment (26 March 2004) ie, for 1,178 days in the sum of
- B** RM9,553.10.
- Special Damages — RM2,838 with interest at the rate of 4% pa from the date of the accident (19 February 1996) until the date of judgment (26 March 2004) ie, for 2,960 days in the sum of RM920.60.
- C** Further interest at the rate of 8% pa on the total judgment sum until the date of settlement, and also cost in the sum of RM6,723.

The second suit

- D** [13] The court held the first and second defendant in this suit to be 100% liable for the accident and awarded the following:
- General Damages:
- Lost of support (RM325 x 12 x 12 years) = RM46,800
- E** Special Damages:
- (i) Lost of EPF (RM70 x 12 x 31 years) = RM26,040
- (ii) Cost of funeral = RM3,800
- F** Interest at the rate of 8% pa for the general damages from the date of the service of the summons until the date of settlement and interest at the rate of 4% pa over special damages from the date of accident until the date of judgment and interest at the rate of 8% pa thereafter from the date of judgment until full settlement. Cost in the sum of RM6,828.
- G** *The third suit*

[14] The court held the first and second defendant in this suit to be 100% liable for the accident and awarded the following:

- H** General Damages — RM10,000 for bereavement.

Special Damages:

- (i) Lost of Support = RM264,000;
- (ii) Cost of Funeral = RM6,600;
- I** (iii) Cost of documents = RM134.

Interest at the rate of 4% pa for the special damages from the date of the accident until the date of judgment and at the rate of 8% pa thereafter until full settlement, and cost in the sum of RM13,826.

[15] The appellants, Tuan Hamzah bin Tuan Mad and Yasco Corporation Sdn Bhd who were the third and fourth defendants in the first suit and the first and second defendants in the second suit and the third suit are now appealing against the decisions on liability and the quantum of damages awarded against them by the learned sessions court judge, and Azidi bin Che Harun who is the plaintiff in the first suit is now cross-appealing for loss of earnings.

A

B

THE SUBMISSIONS

Liability

C

[16] The appellants raised several grounds on the issue of liability, namely:

- (1) That the trial judge has erred in facts and in law when holding the appellants to be 100% liable for the accident.
- (2) That the trial judge has erred in facts and in law when accepting the evidence of SP2, Sergeant 68367 Zainal Abidin bin Mamat in toto without taking into consideration the evidence of other witnesses.
- (3) The trial judge has erred in facts and in law in rejecting the appellants' application to call to the stand, the driver of the motorbus to give evidence after the close of the case.

D

E

[17] The appellants submitted that the liability of the accident is not of the driver of the motorbus. They referred to the police report made by the motorbus driver and also by the driver of the motor lorry (see pp 205 and 206 of the appeal record) whereby the motorbus driver (first appellant herein) in his report explained that the motorcar in trying to overtake another unknown motorcar has encroached onto his rightful lane and collided onto the motorbus. And the motor lorry's driver in his police report explained that as he was driving behind the motorcar, he observed that the said motorcar was out of control and upon reaching KM23.7, has encroached into the other lane and collided with the motorbus. The appellant therefore submitted that based on these police reports, the liability of the accident should be on the driver of the motorcar and not on the driver of the motorbus and thus was wrong in accepting in totality the evidence of the independent witness based on the sketch plan with its key and photographs without referring to these police reports.

F

G

H

I

[18] Other than that, the appellant also submitted that the trial judge has decided on the liability of the appellants prematurely without hearing all the evidence when the trial judge refused to allow the application by the appellants to call to stand the driver of the motorbus to give evidence after the

- A close of both cases. The appellants submitted that if the trial judge were to hear the said evidence, the trial judge would have decided differently, on the liability.
- B [19] The respondent (Chung Mau Leong) however submitted that when there are conflicting versions on how the accident occurred, the court shall look at the silent and incontrovertible evidence namely, in this case, the evidence of independent witness with the sketch plan, photographs, and the nature of damages to each vehicle that will reveal the truth. In support of that submission the respondent cited the cases of:
- C (i) *Zainap bt Abd Majid & Ors v Gan Eng Hua & Ors* [1995] 1 MLJ 801;
- (ii) *Lee Hock Lai v Yeoh Wah Pein* [1999] 5 MLJ 172; and
- D (iii) *Henry Trading Co Ltd v Harun* [1966] 2 MLJ 281 (Federal Court).
- E [20] With regards to the police reports, the respondent also referred to the case of *Sundram v Arujunan & Anor* [1994] 3 MLJ 361 and submitted that as the makers of the police reports were not called to give evidence in court, such reports must remain a *self-serving out of court statement, not on oath and not tested by cross-examination* (quoting Edgar Joseph Jr SCJ, at p 371 of the cited case law), and therefore cannot be considered as evidence in court.
- F [21] The respondent further submitted that the trial judge was right in not allowing the application of the appellants to call the driver of the motorbus to testify in court after the close of the case by both parties. The respondent also relied on several other cases; namely:
- G (i) *Yah bt Aji v Fatimah binti Haji Mohamed Ariffin & Ors* [1969] 2 MLJ 186;
- (ii) *Jong Chuk v Chong Tung Sang & Ors* [1998] 7 MLJ 127;
- (iii) *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285; and
- H (iv) *ING Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong* [2001] 4 MLJ 461.
- I [22] All these cited cases referred to the three principles that were laid down in the case of *Ladd v Marshall* [1954] 1 WLR 1489 that must be fulfilled in order to allow fresh evidence to be admissible:
- (1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(2) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and A

(3) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. B

[23] The respondent thus submitted that since the appellants have failed to fulfill all the above-said three principles, the trial judge was right in not allowing the said application. C

QUANTUM

The first suit

Injuries: Loss of hearing and head injuries D

[24] The appellants submitted that the amount of RM10,000 awarded by the trial judge for the loss of hearing is too excessive, and by referring to the case of *Chew Sheong Yoke v Lawrence Su Chu Seng & Anor* [1996] MLJU 40, the reasonable amount should be in the region of RM2,500 only. E

[25] The appellants also submitted that for the head injuries suffered by the respondent, the amount of RM50,000 awarded was also too excessive, and by referring to the case of *Mohd Zin bin Abdullah v Aznizal bin Rajari @ Mohd Razali* [2000] MLJU 699, and the case of *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786, the reasonable amount for this kind of injury is a sum of RM35,000 only. F

[26] The respondent did not give any reply to rebut the appellants' submission. The respondent however make a submission with regards to his counter-appeal for the loss of earning capacity and by citing the case of *Azizi bin Amran v Hizzam bin Che Hassan* [2006] 4 MLJ 555, submitted that a sum of RM35,000 is a reasonable amount for such loss. G

The second suit

Issues:

(i) *Loss of EPF contribution; and* I

(ii) *Loss of support.*

[27] With regards to the first issue, the appellants submitted that the respondent are not entitled to claim for the loss of EPF contribution of the

A deceased since the respondent has failed to provide any evidence during the trial that she has been named as the beneficiary for the said contribution.

[28] The appellants also submitted that for the loss of support, the trial judge has wrongfully calculated the amount that should be awarded to the respondent. The appellants submitted that SP5 (the respondent herein) has testified during trial that she received RM400 from the deceased every month and that the deceased's cost of food for his breakfast and dinner per month is RM75. The deceased earned RM580 monthly and after deducting the sum of RM400, the balance left for the deceased would be RM180. During cross-examination, SP5 has testified that this sum of RM180 per month was spent by the deceased for lunch and another sum of RM150 per month was spent by the deceased for cigarettes and other expenses. The appellants thus submitted that the correct calculation should be:

D *Personal expenses: RM75 + RM180 + RM150 = RM405;*
Minus the deceased salary: RM580 - RM405 = RM175.

[29] Therefore, it is this nett sum of RM175 that should be multiplied with 12 years in order to get the correct sum entitled by the respondent for the loss of support; that is: $RM175 \times 12 \times 12 = RM25,200$

[30] With regards to the EPF's benefit, the respondent submitted that the appellants have failed to cite any authorities to support their contention that the respondent has to be named as the beneficiary in order to be entitled to claim for the loss of the said EPF contribution. The respondent also submitted that the evidence of PW8 was never challenged by the appellants during trial and further cited two cases to show that the widow of a deceased are entitled to the EPF contribution of the said deceased:

- G (i) *Noor Azahar Habin v Rajaswari Sithampara Pillai & Anor* [1991] 3 CLJ 150;
- H (ii) *Soh Hau Huat, Administrator of the Estate of Soh Mee Leong, deceased v Mohd Nor bin Taya & Anor* [1992] 4 CLJ 2185.

[31] The respondent however did not submit any reply to the appellants' contention with regard to the loss of support.

I *The third suit*

Issues:

- (i) *Loss of support.*
- (ii) *Cost of funeral.*

[32] The appellants submitted that the evidence of SP8 (the respondent herein) that the deceased's husband have a coffee shop and was earning RM6,000 whereby RM4,000 out of the said sum was given to the respondent every month was not supported by any documentary evidence and as such, the evidence should not be allowed due to lack of corroboratory evidence.

A

B

[33] The appellants also submitted that the sum of RM6,600 awarded for the cost of funeral based on the receipt for the said sum (see exh P11) was too excessive. The appellants submitted that the respondent's counsel during trial had intended to call a witness to give evidence on the itemised billing, however, until the end of the plaintiff's case, the said witness was never called.

C

[34] For the loss of support, the respondent however submitted that SP8 has proven, by documentary evidence (see pp 283–288 of the appeal record) that the deceased was indeed the owner of a restaurant with high earning, and further since respondent has been made a widow with five small children under her care due to the accident, the sum awarded by the trial judge is fair and reasonable.

D

[35] As for the cost of funeral, the respondent submitted that a witness has been called to verify the cost spent for the deceased's funeral. The respondent further added that the appellants should appreciate that the cost of funeral for the Tionghua community is high in accordance with their faith and the deceased's status. The respondent thus submitted that the sum of RM6,600 awarded is reasonable and not excessive.

E

F

THE JUDGMENT

Liability

[36] From the facts of the case, the accident occurred at KM23.7 Jalan Kuantan/Maran/Gambang (the old road) involving three different vehicles: a motorcar (CM 6896), motorbus (DW 7661) and a motor lorry (CAJ 4267). At the material time of the accident, the motorbus was coming from the opposite direction from the motorcar and the motor lorry. The driver of the motorbus in his police reports explained that the accident occurred when the said motorcar encroached into the motorbus's lane in an attempt to overtake an unknown motorcar, and the driver of the motor lorry in his police reports explained that the motorcar seems to be out of control and upon reaching KM23.7, the said motorcar then encroached into the opposite lane and collided with the motorbus. No police report was made by the driver of the motorcar as he was killed in the accident.

G

H

I

A [37] Independent evidence can be seen from the evidence of SP2, Sergeant Zainal Abidin (see pp 102–103 of the appeal record) where he showed and explained to the court the sketch plan and the makings made in the plan, and he also described the damages of each vehicles and the conditions of the road after the accident, such as the facts that all debris of glass were in the lane of the motorcar and the motor lorry and the break-marks made by the motorbus (see p 113 of the appeal record).

B
 C [38] Based on these evidences and looking at the sketch plan and photographs taken, the trial judge has made a finding of fact that the liability for the accident was 100% on the appellants (see p 165 of the appeal record) on the following grounds:

D (1) By looking at P4 (sketch plan), most of the after marks of the accident such as oil spills; tyre marks and scratch marks were in the lane of the motorcar. This shows that the accident occurred within the motorcar's lane.

E (2) From the evidence of the investigating officer, the accident occurred as the motorbus took a corner from Maran to Kuantan and encroached into the lane of the motorcar.

F (3) Photographs tendered by SP3 shows that most of the marks of the accident were in the rightful lane of the motorcar and this proves that the motorbus had encroached into the motorcar's lane.

(4) All these evidence by the plaintiffs' witnesses were never challenged by the defendants when they have failed to produce any evidence in rebuttal, (see pp 175–177 of the appeal record).

G [39] The respondent (Chung Mau Leong) has also rightfully submitted that when there are conflicting versions on how the accident occurred, the court shall look at the silent and incontrovertible evidence and further cited the cases of *Zainap bte Abd Majid & Ors v Gan Eng Hwa & Ors*; *Lee Hock Lai v Yeoh Wah Pein* and *Henry Trading Co Ltd v Harun* (Federal Court) in support thereof. In the case of *Lee Hock Lai* for example, Mohd Hishamudin J has held that (at p 178):

I ... since there are two confliction versions, the court should adopt the test enunciated in *Lee Ewe Teik v Ariffin bin Hussain* [1990] 2 CLJ 191 and seek guidance from the sketch plan and key, photographs and the damage to the vehicles..!
 (Emphasis added.)

[40] And in the case of *Henry Trading Co Ltd*, the Federal Court held at p 282:

... I feel that the proper thing to consider is not so much that the plaintiff/respondent said or what the defendant/appellant said but what the Sergeant, whom I consider to be an independent witness, witness No 2 for the plaintiff had to say in this matter ...

A

[41] The appellants have also raised the issue of the dismissal by the trial judge of their interlocutory application to call the driver of the motorbus (the appellant herein) to testify after the both parties have closed their cases (see annexure 146). The said interlocutory application was dismissed on 30 May 2003 (see p 159 of the appeal record), and the decision of the full trial was only delivered almost ten months later, on 26 March 2004 (see p 164 of the appeal record). This, in my opinion should have given the appellants' counsel ample time to appeal against the said dismissal and devoid of such an appeal, the appellants are not allowed to raise this issue during the appeal against decisions made at the full trial.

B

C

D

[42] In the circumstances, I am therefore satisfied that the findings of the trial judge with regard to the liability of the appellants have been rightfully made and as such there is no reason to alter the findings.

E

QUANTUM

[43] With regards to quantum, as the appeal involves three suits, I will therefore address and decide each suit separately.

F

The first suit

[44] The appeal is only with regards to two items; namely:

- (i) Partial loss of hearing; and
- (ii) Head injuries.

G

[45] I am satisfied that the amount awarded for the loss of hearing in the sum of RM10,000 by the trial judge is a reasonable amount and therefore the decision is upheld.

H

[46] However, with regards to the head injuries, based on the submissions of the appellants and in referring to the cases of *Mohd Zin Abdullah* and the case of *Chong Chee Khong*, and as these submissions were not rebutted by the respondent, I am therefore in agreement with the appellants' contention that the reasonable sum that should be awarded for the head injuries suffered by the respondent is RM35,000. I therefore allow the appeal and reduce the sum of RM50,000 awarded by the trial judge to the sum of RM35,000.

I

- A [47] With regards to the cross-appeal of the respondent to claim for the loss of earning capacity, I hereby dismiss the said appeal on the ground that the respondent has failed to adduce evidence to support his claim. Furthermore, it is in evidence, as can be seen in the testimony of SP1 (the respondent herein) whereby he himself has admitted during cross-examination that he was given salary before and after the accident without fail (see p 98 of the appeal record). Therefore there is no loss of earning capacity.
- B

The second suit

- C [48] The appeal is also with regards to two items; namely:
- (i) Loss of support; and
 - (ii) EPF contribution.

- D [49] With regards to the first item, I am satisfied with the submission of the appellants that the correct calculation for the loss of support should be $RM175 \times 12 \times 12 = RM25,200$ only and not $RM325 \times 12 \times 12 = RM46,800$ as held by the trial judge. The amount of RM46,800 awarded by the trial judge is therefore reduced to RM25,200.
- E

- F [50] With regards to the second item, the claim for the EPF contribution has been duly pleaded by the respondent in her statement of claim (see p 68 of the appeal record) and her claim was further supported by the testimony of the EPF's officer SP9, and by referring to the case of *Soh Hau Huat*, it is clear that claims for EFP contribution by the surviving spouse can be allowed. Further, the appellants have failed to substantiate their submission that the spouse must be a named beneficiary of the said contribution before she can make any claim. I therefore upheld the sum of RM26,040 awarded, as the loss of EPF contribution to the respondent by the trial judge.
- G

The third suit

- H [51] The appeals in this suit are with regards to the:
- (i) Loss of support; and
 - (ii) The cost of funeral.

- I [52] With regards to the first item, the basis of the appellants' appeal is the sum of RM264,000 awarded by the trial judge to the respondent for the loss of support based solely on the testimony of SP8 who testified on the income of Restaurant Nam Heng owned by the deceased without reference to any documentary evidence. It must be noted herein however that this testimony was never challenged by the appellants during trial.

[53] I am however of the opinion that in the circumstances of the case, documentary evidence is the best evidence to support a claim. In the present case, the documentary evidence that can be used in order to estimate yearly reasonable income of the deceased on the average is the JA Form for the year 1993 and 1994 (see pp 283–284 of the appeal record). If we take the highest earning which is about RM1,867, the correct calculation for the loss of support should be $RM1,500 = RM99,000$. I therefore reduce the amount of RM264,000 for loss of support awarded by the trial judge to RM99,000.

[54] As regards to the issue of the cost of funeral raised by the appellant, I found that the respondent has duly testified and had further tendered a receipt (see exh P11 at p 282 of the appeal record) as the documentary evidence to prove that the cost of funeral was indeed RM6,600. There is therefore no reason for me to alter the amount awarded by the trial judge. The appellant's appeal on this ground is therefore dismissed.

[55] In the circumstances, the costs of these appeals are to follow the event, of each respective appeal, accordingly.

Appeal on liability dismissed and quantum of damages varied.

Reported by Ashgar Ali Ali Mohamed

A

B

C

D

E

F

G

H

I